7-1-70

Honorable David N. Henderson
Chairman, Subcommittee on Manpower
and Civil Service of the Committee
on Post Office and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your request to the Secretary of State dated June 10, 1970, for the views of the Department of State on S. 782, a bill "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

As previously stated in its report on S. 1035, a similar bill of the 90th Congress, the Department of State supports the stated purpose of S. 782. However, our review of the bill's provisions has led us to conclude that sections 4, 5, 6 and 7 of the bill should be amended in the manner discussed below, and that if the bill is favorably considered by your Subcommittee it should be accompanied by a legislative history which removes the possibility of various subparagraphs of section 1 being interpreted in a manner that would impair the Department's ability to maintain its present high standards of personnel security and employee conduct. Our detailed comments on these matters appear below.

The Department also believes that, because the provisions of section 1(e) and (f), among others, are of interest to members of the United States Intelligence Board other than those agencies presently mentioned in sections 6 and 7, the Subcommittee should ensure in the legislation that all the members

of the Board receive uniform treatment under the exemptions provided.

Amendment of Sections 1(k), 6, and 7

In sections 1(k), 6, and 7, the Senate has recognized the need of agencies charged with responsibility to protect highly classified information to be free from some of the prohibitions contained in section 1 of S. 782. However, the exemption provisions in these sections do not extend to all intelligence agencies which share this need. The Department of State, therefore, urges that the exemptions in sections 1(k), 6, and 7 be extended to all members of the Intelligence Board and amended substantively to accomplish two objectives: to authorize all members of the Board to provide by regulations that various of the prohibitions contained in section 1(e), 1(f), and 1(i) will not apply to such oral interrogation of applicants and employees as is reasonably relevant and necessary to determine their qualifications to obtain or retain, respectively, a security clearance under the standards enunciated in Executive Order 10450, as amended; and to authorize the agency head, or his designee, to approve psychological and polygraph tests on an individual basis as required by the national security.

Executive Order 10450, section 8, which applies to the Department, as well as other members of the Board, provides in part:

> "Sec. 8(a). The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:
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> "(1) Depending on the relation of the Government employment to the national security:
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> "(i) Any behavior, activities, or associations which tend to show

> that the individual is not reliable or trustworthy.
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> * * * *
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> "(iii) Any . . . sexual perversion, or financial irresponsibility.
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> * * * *
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> "(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security."

In many situations these requirements can better be met by discreetly questioning an applicant or employee than by conducting a thorough investigation involving extensive questioning of his neighbors, friends and associates. Accordingly, in the interest of applicants and employees as well as the Department, the Department believes the prohibitions in section 1(e), (f) and (i) should be modified.

Amendment of Sections 4 and 5

Section 4 of the bill would provide a remedy directly against the offending officer for employees or applicants who are affected or aggrieved by the violation or threatened violation of the act. Heretofore, the courts have consistently held that an officer may not be required to respond personally in damages for his discretionary acts within the general scope of his official authority. The justification of this doctrine has been the judicial awareness that personal liability would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." The Department believes that the Congress should give consideration to this judicially-expressed concern before eliminating by legislation the protection currently afforded public officers by the official acts immunity doctrine.

Preferably section 4 should be deleted. If it is not, the Department strongly believes that any monetary relief to be granted applicants or employees who are in fact damaged by an employee's conduct which violates section 1, should be against the Federal Government, as under the Federal Tort Claims Act, rather than against an employee.

The Department is also opposed to the creation of a quasi-judicial board which would be established by section 5. We believe that such a board is unnecessary and that the maintenance of sound employee-employer relations as well as an efficient security program requires ultimate reliance upon internal agency procedures for the prevention of unwarranted invasions of personal privacy by overly-zealous officers. However, if the board to be created by section 5 is found necessary, it should be available only if internal procedures fail. For first offenses the board should have power to do no more than issue a cease and desist order, and an employee should not be subject to board-imposed reprimand, suspension, or removal unless he violates such an order.

Additionally, the Department believes that the authority of this board should extend only to violations of the act by one employee against another employee, and not to violations against an applicant. An applicant who has been denied employment might possibly be inclined to assert groundless charges against the employee whom he suspected of being responsible for his rejection. The threat of such charges could discourage employees from diligently performing their duties. The possible risk of harm to an applicant from an occasional transgression of section 1 does not warrant this offsetting threat of groundless charges.

Interpretation of Section 1

Various paragraphs in section 1, which are discussed below, may possibly be given extreme interpretations that are not necessary to protect the interests of employees and applicants sought to be protected and would be highly disruptive of sound internal procedures. The Department believes that

passage of these provisions should be accompanied by a clear legislative history that precludes these interpretations.

Section 1(b) conceivably could be interpreted to prohibit the Department from taking notice of the attendance by an employee at a meeting held by an outside organization for the purpose of indoctrinating an employee on any subject not directly related to the performance of his official duties, including even a meeting held by a subversive group.

The Senate report clearly indicates that this prohibition was directed against agency coercion of participation by employees in community action, civil rights, or other officially approved programs. (S. Rept. No. 91-873, pp. 38-39). It should further be made clear that this is the paragraph's only effect.

Section 1(d) is also concerned with outside activities, undertakings and, inferentially, with associations of employees. By prohibiting inquiry into all such activities not related to the performance of duties to which an employee is or may be assigned, this paragraph could be interpreted so broadly as to unduly curtail the Department's personnel security procedures and its personnel conduct programs.

If the Department were to become aware of an employee's association with subversive elements or other conduct having security implications, it would seem appropriate to ask the employee about that association or conduct. And, apart from security investigations, the Department has formulated standards of conduct intended to minimize private acts by employees which could have undesirable ramifications in the field of foreign relations. This Government's obligation to the foreign countries where our employees are assigned, given expression by specific provisions of U. S. law in some cases, justifies regulation of certain political, economic, and financial activities of employees overseas. The Department's regulations also require employees to obtain clearance prior to publication of articles or delivery of speeches on topics of official concern.

The Department believes that its present practices are consistent with the phrases in this paragraph excepting "activities or undertakings.....related to the performance of official duties" and "outside activities or employment in conflict with his official duties." However, a clear legislative history should be made to bolster this interpretation.

OMB

The Bureau of the Budget advises that from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely yours,

David M. Abshire
Assistant Secretary for
Congressional Relations

Clearances:

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O - Mr. Macomber

H - Mr. Leahy

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